FILING BRIEF FOR APPELLEES

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 148.

THE CITY OF LOS ANGELES, ET AL.,
APPELLANTS,

vs.

LOS ANGELES CITY WATER COMPANY, ET AL.,
APPELLEES.

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JOHN GARBER,
Attorneys for Appellees.

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Of Counsel.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED MARCH , 1908.

IN THE

SUPREME COURT

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UNITED STATES

Appeal from the Circuit Court of the United States for the Southern District of California.

The City of Los Angeles, et al.,
Appellants,

vs.

Los Angeles City Water Company, et al.,
Appellees.

REPLY BRIEF ON BEHALF OF THE APPELLEES.

In replying to such of the points made by the appellants as we deem it necessary to further consider, we call attention,

FIRST: On page 7 of the brief it is said that the city was, in addition to a certain water system, which it was supposed to have owned, also the owner of the paramount right to the use of the waters of the stream which flowed through the city, called the Los Angeles river, by virtue of the laws of Spain and Mexico which accorded

to the pueblos established by those governments the right to water courses which flowed through or along the land of such pueblos, and it is claimed that the right of the city as successor of the ancient Spanish and Mexican pueblo has been established in a series of suits beginning with

Elms v. Los Angeles, 58 Cal. 80,

and ending with the

City of Los Angeles v. Pomeroy, 124 Cal. 597.

To this we answer, first: That neither the title of the City of Los Angeles to the waters of the Los Angeles River nor the extent of its rights to use the same is at all involved in this suit, and is a matter of too great importance to be determined in a controversy where it is of no consequence. The Los Angeles City Water Company is not setting up any claim to any rights adverse to the City, but the whole foundation of this suit rests upon the contract made with the City, and all the rights of the Los Angeles City Water Company, whatever they may be, are derived from that contract. Besides nobody has ever doubted that the City of Los Angeles had an interest in the waters of the Los Angeles River, which interest is amply sufficient for all the purposes of this contract. The only controversy that there has ever been is as to the extent of those interests, the City having for years claimed to be the absolute owner of all the waters of the Los Angeles River, and of all the waters permeating the soil above the city. These rights, to the extent claimed by the city, have been repeatedly questioned, but they are

not involved here. But if any such question exists here or is necessary to the decision, it is respectfully submitted that it has not been established by a series of suits, beginning with Elms v Los Angeles, that the City of Los Angeles has any such rights as are determined in the case of the City of Los Angeles v. Pomeroy, 124 Cal. 597. There it was held that by virtue of its succession to some pueblo, whose very existence is exceedingly doubtful, it had certain paramount rights to the use of the waters of the river, and that these rights were of such an extravagant nature that it made no difference to what extent the boundaries of the City of Los Angeles might go under the laws of the State of California, those pueblo rights would expand with it, and cover every sort of a use to which water might be applied in any part of the territory which, under the acts of the Legislature of the State of California the boundaries of the City of Los Angeles might be extended.

Here let it be noted that the claim presented by the Mayor and Council of the City of Los Angeles to the Board of Land Commissioners for the settlement of private land claims in the State of California, was for sixteen square leagues. The decision was that the Mayor and Council of the City, which was then the corporate name of the municipal incorporation, had a good and valid claim for four square leagues, and it was approved to that extent and rejected for the balance. Since the patent issued for the four square leagues, the boundary has been extended in accordance with the laws of the State

of California until the City now includes nearly double the amount of land which was thus patented to it.

The question as to the rights of the City of Los Angeles do not depend upon the construction of any local statutes or rules, but assuming that the City of Los Angeles is the successor to any pueblo, the queston is, whether under the laws of Spain or Mexico, the pueblos had any such paramount rights to the use of the water at all, and whether as against other grantees of the Mexican government or persons holding title under the United States government of public lands which were situated along this Los Angeles River, these pueblo paramount rights, if they existed, expanded with the extension of the territorial limits of the city.

The decision of the Supreme Court of the State of California upon these questions does not establish a rule which this court is bound to follow, or which it will follow unless satisfied with the correctness of the decision; and it is respectfully submitted that no such rights attached to the pueblos under any Spanish or Mexican law, and that the City of Los Angeles, while as stated before, has its rights in the use of the waters of the Los Angeles River, there is no authority for any such rights as were in that case declared to exist.

SECOND. It is said that the contract also purported to cede to the lessees all the rights, easements, privileges and covenants described and contained in a certain instrument of lease made in 1865 by the city to one John L. Sansevaine,

but that the bill of complaint fails to set out this lease, so that we are ignorant of its terms so far as shown by the record. It does not very clearly appear whether anything is sought to be made out of this omission or not, but if so, it is submitted that the fact that it has not been made to appear is itself sufficient proof that it contained nothing that would in any manner tend to illustrate the proposition here.

The contract upon which this suit is brought is not a lease, but it is a complete contract fixing the rights of the parties under it, and nothing is necessary to the interpretation of it for any purpose involved here that is not in this record. The claim that this was a lease merely and that at the end of the thirty years the City of Los Angeles was entitled to the immediate possession of the property, was made in the case of Los Angeles v. Los Angeles City Water Company, 124 Cal. 368, 376, 379, 380, and concerning this proposition, the Supreme Court of California said:

"This position is not tenable. The written instrument in question cannot be categoried into any smaller class than that of a contract It is a contract with many and various covenants."

Id. 380

THIRD: On pages 11 and 12, we are informed that the Company had collected four million two hundred and twenty-eight thousand dollars up to October, 1896, and at the same rate would collect by the end of the thirty years, the further sum of seven hundred and fifty thousand dollars,

making an aggregate of about five millions, and that no assessments had been levied on the stockholders in excess of seventy-nine thousand, five hundred dollars.

Brief, pp, 11-12.

What bearing these figures have upon the questions in controversy here is not very apparent. The folios referred to in the brief are those where the annual statements of the Company are to be found. When the enterprise was first launched it was one of considerable financial hazard and for a long time its profits were practically nothing. But an unexpected occurrence of events some fourteen or fifteen years after the contract was entered into gave to the progress of the city such an impetus that its present population is over one hundred thousand. At the time the contract was made it was a village of about five thousand inhabitants. It will be seen from the United States census of 1880 that its population then was less than twelve thousand. But it was shortly after this that it began a career such as has hardly ever been equalled in the United States by any city, and the Water Company's business has become a profitable one. To the mind of the City this appears to be an amply sufficient reason why the contract should be wholly disregarded. It began cutting the rates about the time that this boom, as it is called here, began. Their attention was called to the provisions of this contract from the very commencement of the City's demands for these statements. [Tr. fol. 238-243.]

The first extension of the boundaries was in

1872, but that extended the limits only about four hundred and twenty yards south of the patent boundaries. But within about three years prior to July, 1897, the extensions had been such as to take in between ten and fifteen square miles of additional adjoining territory. [Tr. fol. 226.]

The fact that in the last few years the receipts from this property have been such as to make the investment a paying one does not in any manner affect the question of what is the meaning of this contract.

FOURTH: On page 13 of the brief, after stating the organization of the Crystal Springs Land and Water Company, the counsel for the City chose to inform us that the object of this new corporation was probably two-fold. First, to construct headworks in the name of a company not a party to nor successor in interest of the lessees of the contract of 1868, so that the City at the end of the term of the lease would not have any headworks with which to supply the distributing system. Secondly, to go through the form of taking the revenues out of one pocket and putting them in another, in the shape of a rental, so as to increase the apparent expenses of supplying water to the City, and thereby justifying higher rates. These probable two-fold objects are extracted entirely out of the imagination of the counsel for the city. Evidence of it, there is none. In the bill filed herein the history of this Crystal Springs property, and what it is, is set forth. [Tr. fols. 11-15.] A considerable portion of this history is represented in the stipulation. [Fols. 217, 223, 224.]

The property of the Crystal Springs Land and Water Company consisted at one time wholly of tracts of land located in the Ranchos San Rafael and Los Felis, none of which, except a four-acre tract, part of the Crystal Springs tract, so called, ever belonged to the Los Angeles City Water Company, and rights of way acquired from the owners of other tracts in said two ranchos, with the right to make excavations for the purpose of developing the waters, some of which rights of way have never been owned by the Los Angeles City Water Company. What necessity there was for any new corporation to be organized to avoid having such properties come within the contract of 1868, no one has ever been able to explain. How a tract of thirty-two acres of land in a Mexican grant, purchased in fee simple by the Crystal Springs Land and Water Company could have been "improvements made on or about a system of waterworks," even if it had been acquired by the Los Angeles City Water Company, it is impossible to discover.

Furthermore, why any sort of a performance should be gone through with to apparently increase expenses to justify higher rates, our adversaries do not appear ever to have been prepared to inform us. The Los Angeles City Water Company has always relied upon the contract. It has asked nothing except that the rates shall not be reduced below the rates mentioned in that contract. If they have this contract right, there was no need for any legerdemain to make things appear to be what they were

not at all. If they have not that right this bill cannot be maintained because it does not found itself upon any other claim than that under the contract.

FIFTH: It is next asserted that there is no evidence except the report of the committee to show what the rates in 1868 were. [Brief page 14.] This is a mistake which has already been sufficiently pointed out. There was the evidence that this committee was appointed for the purpose of determining it, and that when they made the report, it was acted upon by both parties, and accepted as correct.

SIXTH: It is next said that there is in the answer a denial that the City will attempt to enforce the forfeiture provided for by the constitution and laws of this State, in the event that the company should charge greater rates than those fixed by the ordinance. This occurs in paragraph XVII of the answer [Tr. fol. 115]; but it will be observed that this answer is signed by counsel and is verified by E. L. Blanchard on the part of the defendants, Silver, *et al*, including Blanchard, who constitute the City Council. On behalf of the defendant, the City of Los Angeles, the answer is signed by the City Attorney, and his associate counsel, and verified by W. E. Dunn, the City Attorney. Neither of the answers is really the answer of the City at all, and it would hardly be pretended that the answer of the attorneys for the City would preclude the City from insisting upon the forfeiture to itself, which the constitution defines, in view of the fact that in the same answer,

all of the defendants are insisting upon it that the contract which undertook to limit the power of the City in fixing the rates was unconstitutional and void.

And it is now, in this court, insisted that the contract is, at least in that respect, invalid. See assignments of error, [Tr. fol. 262–279] Brief, p. 16–22.

SEVENTH: The first point made by the counsel is that the contract does not purport to bind the State not to reduce rates, but applies only to the City in its corporate capacity. [Brief p. 22].

If there could be any question as to where the ultimate power of fixing rates resided at the time of the making of this contract, there is none now. The constitutional provision so often quoted in these cases, directly provides that the rates for supplying cities and their inhabitants with water shall be fixed annually by the Board of Supervisors, or City and County, or City, or Town Council, or other governing body of such City and County, or City or town, by ordinance, or otherwise, etc. [Constitution, Art. XIV, Sec. 1].

We confess that we do not exactly understand what the counsel here are contending for. It would seem that while the city might enter into such a contract with Griffin Beaudry and Lazard, and the Legislature might ratify it, and it might thus become a binding contract according to its very terms, yet there would be nothing in this that would prohibit the Legislature of the State of California from annihilating that provision at

any moment by a mere change in the agency by which the rates are to be fixed.

According to the argument, the next day after the Legislature had ratified this contract, it might have provided that the mayor alone or the city treasurer and auditor might regulate the rates which were to be charged by Griffin, Beaudry and Lazard or their assigns, and that such an act would not have affected the obligation of the contract.

Now the very point decided in the Spring Valley Waterworks v. the Board of Supervisors of San Francisco, 61 Cal. 3, was that the provisions in the act of 1858, by which the board for fixing the water rates was to consist of two members chosen by the City, two by the Water Company and the four to select a fifth, was simply the designation by the act of the Legislature of the agency by which these water rates were to be established; that this did not prevent the State from organizing municipal corporations in a different manner or providing other agencies to exercise this particular function, and that therefore the constitutional provision that the rates should be fixed by the council or other governing board did not divest the Water Company of any right vested in it. That by making such appointments or such agencies, the State did not incur any obligation to continue them, but it might change mode of appointing agents at any time, or it might discharge at any time those who have been appointed and appoint others, in any mode it saw fit. That the power of the State over its agents or officers is unlim-

ited, except by constitutional limitations [61 Cal. 7].

It was also held by the Supreme Court that when the constitution took away from the Water Company the privilege of having a voice in fixing the rates, it might charge for water supplied, it relieved the company of supplying water to the City for any purpose free of charge.

Spring Valley Waterworks v. Board of Supervisors, 61 Cal. 18, 27.

But now neither the State nor the City was under any contract obligation with the Spring Valley Waterworks in reference to the rates, and as there decided, the tribunal by which rates are to be established is not something which the State or the City is bound to continue, nor are we contending for any such thing here. We admit that Jacobs v. the Supervisors, 100 Cal. 121, determines that the mayor is not now a part of the tribunal for fixing the rates, that the new constitution expressly declares that it is to be done by the Board of Supervisors or City or Town Council or other governing body of such City or County, etc. We do not contend that it was not competent for the City of Los Angeles to be reorganized and its powers conferred upon whatsoever officers or tribunals the Legislature within the constitution, or the constitution itself, might see fit to prescribe; but what we say is that a mere change of the agency does not defeat the contract. The right of the City to regulate the charges for water existed, and in this particular contract, that right was reserved, but with a certain limitation; and while the agen-

cies by which that power might be exercised could be changed without interfering with the contract, such a change was not an enlargement of the power of the City. This provision was a substantial one, and the parties to this contract were undertaking the expenditure of large sums of money, the construction of a complete and adequate system of waterworks, the supplying of the City itself with water free of charge for a period of thirty years. It was paying an amply sufficient consideration for all that it was obtaining, and the insertion of this clause in this contract did not show that the parties supposed that its omission would have left the City without any right to fix the charges, but it showed that they understood that without such a provision the City's power over it would be practically unlimited. And it is a curious argument that draws from the reservation of the power, the conclusion that the parties supposed that if the reservation had not been inserted the power would not have existed at all. A reservation to the City of some power that it did not possess would certainly be a gross misuse of the word "reserve". But, besides, we are not left to mere conjecture upon this subject. Whether the corporation act of 1850, giving as it did, to cities of this state, full power to provide for supplying the people with water, was sufficient as a grant of the power to regulate the rates for the use of water might admit of some argument; but the legislature itself construed it too long ago to admit of there being any question about it now. The third section

of the act of May 3, 1852, providing for the incorporation of water companies, contains this clause:

"This act shall not give to any company a right to supply any city with water, unless it shall be previously authorized by an ordinance, or unless it be done in conformity with the contract entered into between the city and the company; any contracts hereafter so made shall be valid and binding in law, but *shall not take from the City the right to regulate the rates for water*, nor shall any exclusive right be granted by contract or otherwise for a term exceeding 20 years." Now, why provide that it should not take away the right, if no such right existed at all?

When in the contract here under consideration, it was provided: "*That the Mayor and Common Council of said City*" shall have and do reserve the right to regulate the water rates charged by said parties, etc., it is evident that the Mayor and Common Council of said City was used as the designation of the City itself, and it was a mode of expression that was quite common in the statutes of California, and with reference to this very city whose corporate name was at one time The Mayor and Common Council of the City of Los Angeles. Thus in the act of February, 1862, the title is: "An Act to authorize the Mayor and Common Council of the City of Los Angeles to borrow money for municipal improvements." The first section is "The Mayor and Common Council of the City of Los

Angeles are hereby authorized to borrow money for the purposes of municipal improvements either of irrigation or for furnishing water for domestic purposes to the amount and in the manner set forth." [Statutes of California, 1862, p. 10].

Now this act was amended at the same session by an act entitled: "An Act to amend an act approved February 19, 1862, entitled an act to authorize the Mayor and Common Council of the City of Los Angeles to borrow money for municipal improvements." The amendment consists of an amendment to Section 5, which was amended to read as follows:

"For the purpose of paying the interest on any debt or debts that may be contracted *by the aforesaid corporation*, under this act and to provide for the payment of the principal of the same when due, said corporation shall levy and collect a tax of thirty-five cents on every hundred dollars worth of taxable property, real and personal within the said City, five-sevenths of the fund derived from which said tax shall be set aside and applied exclusively to the payment of the interest, and the final redemption of the bonds or other evidences of indebtedness issued in pursuance of this act, and shall be known by the name of the interest and loan fund of 1862." [See Statutes of 1862, p. 262].

The fifth section of the original act did not differ in its mode of expression. It was there declared that for the purpose of paying the interest on any debt or debts that may be contracted by the aforesaid corporation under this

act, and to provide for the principal of the same, etc. [Statutes of 1862, p. 10].

Here it is obvious that the legislature was using the term "the mayor and Common Council of the City of Los Angeles," as being exactly the same as the corporation, and the loan which they were authorized to make, was the loan of the City itself.

A similar expression is found in the statute of 1861, where the mayor and Council of the City of Los Angeles were authorized to take and subscribe $50,000 to the capital stock of a railroad company in the County of Los Angeles, and to provide for the payment of the same, and other matters relating thereto; and it was there provided that when a petition from the board of directors of the railroad company, organized for the purpose of constructing a railroad by which a railroad connection should be formed between the City of Los Angeles, and the Bay of San Pedro * * * shall be presented to the mayor and council of the City of Los Angeles, petitioning the City to take and subscribe the sum of $50,000 to the caipital stock of such railroad company, "the said mayor and council shall, at the next regular meeting, or special meeting held for that purpose, vote upon the said request or proposition whether or not said stock shall be subscribed for; and if at such meeting a majority of said Common Council shall vote in favor of said proposition, then, in that event, the said mayor and Common Council shall in the name of said City of Los Angeles for the use, benefit and advantage of the said

City, take and subscribe the capital stock, and pledge the faith of the City of Los Angeles for the payment." [Statutes of 1861, page 457] And all through this act the body which is to act is the mayor and Common Council, or sometimes the Common Council alone is mentioned.

We insist upon it that the meaning is the same here—that the City did have the right to regulate the rates; that by this contract, limitation was put upon this power of the City, and that the limitation was ratified by the legislature of the State of California, and the mere change of agencies by which the general power to regulate is to be made, does not in any manner put an end to the limitation itself. The rule which is invoked to support this somewhat extraordinary contention, viz: that in public grants the construction is to be strongest against the grantee—has never yet, so far as we are advised, been carried to the extent of turning public grants or public contracts into mere cheats.

The case of

Logansport Gas Co. v. Piru, 89 Fed 85,

cited in the brief at page 24 is no authority for such a proposition. Besides it is directly contrary to the conclusion of the counsel that the City of Los Angeles did not have the power under the acts of the Legislature, as they then stood, to regulate the rates. In that case the City of Piru had adopted an ordinance in July, 1887, authorizing the laying and maintenance of pipes by corporations, companies and individuals, in the streets, etc., for the purpose of sup-

plying it and its inhabitants with natural gas for heating and illuminating purposes. The 11th section of this ordinance, so far as pertinent to the case, was set out in the opinion, and it provided in substance that any persons availing themselves of the rights under that ordinance should be understood to be acting with the condition that they should furnish natural gas to consumers for and at a price not to exceed 25 per cent above the schedule of prices following—which schedule was set forth. This ordinance was not accepted by any company or individual, and in November, 1887, they amended the ordinance by which the common council expressly reserved the right to fix the rate and price to be charged for gas after the expiration of ten years from the date of the passage of the ordinance, and every five years thereafter. [85 Fed. 186.]

Now it was held that when this ordinance, as amended, was accepted by the complainant's predecessor, it became binding on the complainant as though it had been expressly accepted by it: And said the court:

"The City at the time of the adoption of the ordinance possessed the undoubted power to fix the prices to be charged for natural gas, and no corporation or individual had or could acquire the right to pipe gas into the City for sale without accepting and agreeing to be bound by the prices so fixed."

This provision of the ordinance, when accepted, would for its validity rest on the contracting, and not on the legislative power of the Common Council. It seems apparent from the

terms of Sec. 11 of the ordinance and the amendment thereto that the Common Council was determined not wholly to contract away the right. By the amendment it waived the right to fix prices for the first ten years and reserved the right as fully as it originally existed, for the last ten years of the term. It is clear that the Common Council would not have granted the complainant an easement to use the streets of the city except upon condition that it should have the right to fix the prices of gas for the last ten years. By the acceptance of the ordinance a contract arose by which the complainant agreed that the Common Council in existence at the expiration of ten years should have the right to fix the prices to be charged for gas. When the Common Council exercised this reserved power by the adoption of the ordinance complained of, it was exercising a power reserved to it by express agreement of the complainant. It was not exercising a power of a mere legislative nature, but was exercising a power reserved to it by the express agreement of the complainant. The right so exercised by this agreement was not the right to ascertain the reasonable price of gas, and when so ascertained to fix it at that rate, but the right reserved was the right to fix its price to consumers." [*Id.* 186-187.]

The meaning of the decision is perfectly apparent. The City had the undoubted right to fix the price. It passes an ordinance, though, by which it practically agrees that it waives this right for the first ten years out of the twenty, but declares that after the ten years it

reserves the power to fix the rates. And when it was accepted, the Court said, it was a contract, a contract by which the City agreed not to fix rates for the first ten years, and by which, however, it was agreed that after that time it might fix them, and that no action in that respect could be complained of unless it amounted to a fraud.

The case here is of the same general nature. The right of the City of Los Angeles to fix the rates to be paid for water is undoubted. The powers given in the act of 1850 are amply sufficient to include it. It was construed by the legislature itself as giving it, and in this contract it is provided that that power is reserved, but subject to the limitation. And now we say that when accepted by the plaintiff and its predecessors, it became a contract, and the power was not the mere exercise of the legislative power, but the legislative power as modified by the contract.

We have no fault to find with the case of
Minturn v. Le Rue, 23 How 435, and
Fanning v. Gregoire, 16 How 524.

The first of these cases has little to do with any question involved here. The general proposition that grants by the legislature to corporations, whether public or private, are to be construed most strongly in favor of the grantor, that any ambiguity or doubt is to be resolved in favor of the public, is not denied by us.

The case of Fanning v. Gregoire proceeds, no doubt, upon the same general rule. But before leaving this case, we desire to call attention to

the very manifest distinction between Fanning v. Gregoire and the present case. The grant of the right there was to keep a ferry. It was granted to the plaintiff for twenty years by the legislature of Iowa, while Iowa was still a territory. By that act it was provided that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque. Subsequently the city of Dubuque was incorporated with power to license and establish ferries across the Mississippi river from the city, and under the power given, the city granted the defendant the right to keep the ferry. It was held that the first grant was not exclusive, and did not prevent the conferring of the power upon the city of Dubuque subsequently, when it had been incorporated. Now this right of keeping ferries, building bridges, constructing roads, is of a strictly public nature; but in the making of contracts for supplying cities and their inhabitants with water, the City is not in the exercise of its governmental power, but its proprietary or business powers.

"A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its

people and is bound to transmit its powers of government to its successive sets of officers unimpaired; but in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants and it may exercise the business powers conferred upon it in the same way and in their exercise is to be governed by the same rules that govern a private individual or corporation. * * * In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants but to obtain a private benefit for the city itself, and its denizens."

Ill. Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 282.

The stars here are authorities cited for this proposition. This distinction has been also stated in

Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 10, 15–19.

From page 18 we quote the following:

"Cases are not infrequent where under a general power to cause the streets of a City to be lighted or to furnish its inhabitants with a supply of water without limitation as to time, it has been held that the City has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more

than bind the City to carry out the contract in good faith, and with decent regard for the rights of the other party."

Here follows the citation of a number of these cases, and among them Minturn v. Le Rue, 23 How. 435, and after the citation of the cases, the Court said:

"These cases furnish little or no support for the propositions for which they are cited."

And the case of Fanning v. Gregoire, 16 How., is another that may be included in the same list as having precious little, if any, bearing upon the question here.

In a recent case, the New York Court of Appeals had occasion to consider this question of how far rules for construing public grants applied to contracts which were for the mutual benefit of both parties, where the government does not hold itself out as conferring a bounty upon adventurers who are seeking its aid and support, but is inviting private capital to come to its aid, and they held, practically, that where the State is contracting like a private party on equal terms, those decisions and the doctrines which they announce have no application.

In the case of People v. Warren, 34 N. Y. Supplement, 942, the Court said:

"That the State surrenders its public and governmental functions and stands on an equal footing with an independent contractor with it as to such work as that in question here, and that as a State, it exercises no dominion over the property or control over the employment of laborers upon the work being done, is well

stated by Dillon in his work on Municipal Corporations, as follows:

"While the power to contract is a necessary constituent of the sovereignty of the State, when it enters into a contract with a private individual, it relinquishes its sovereign character by such transactions and as a general rule can claim no exemption from rules of law applicable to private parties under like circumstances."

This doctrine is fully applicable to this case. Here the history of these transactions is set forth. The City was in need of a system of waterworks adequate to the supply of the City and its inhabitants, and all previous attempts in that direction had proven a failure, and it contracted with the assignors of this appellee for the construction of such a system, its maintenance for the period of thirty years at its own expense, the extension of that system from time to time, as the needs of the City required, and in the meantime and during the whole term of thirty years, and as we say, until payment is made, to furnish the City with water for municipal purposes free of charge, and all this, the agreed statement of facts shows that the company has done, and there is no room for asserting that the only obligation which the City entered into with respect to this matter is to be gotten rid of on the doctrine that public grants are to be strictly construed. Besides that, there is not any doubt in this case, no matter by what name this contract may be called, nor what may be the character of the franchise. There is the plain agreement that while the City may regulate the rates, it will

not fix them at a less amount than was charged by the parties at the time the contract was made.

It is said, on page 31, that the admission of appellee's counsel that no exclusive franchise was attempted to be granted is an admission that the provision under consideration did not apply to the state. But unfortunately no such admission is made. Counsel do not refer to the spot where such an admission could be found, but we suppose it refers to the ninth subdivision of the brief, commencing on page 79, where after stating the claim that this contract was void because it was an exclusive franchise, we said: To this we answer, it is doubtful whether the provision referred to can be called a *grant* of an exclusive franchise at all, and in the course of the discussion we attempted to show that where there was any grant at all, exclusive or other, it was of things the City claimed to own, and that, as to the one thing which is the subject of this controversy, it is not a grant at all of any kind properly so-called, and coming within the rule referred to. The fact which we were there endeavoring to illustrate is the thought suggested by the various phases of the Westerly Waterworks cases.

These cases first appear in the 75th Federal Reporter, under the title of Westerly Waterworks v. Town of Westerly, *et al*, and Seamen's Friend Society *et al* v. Same, 75 Fed. 181.

There was an application for a preliminary injunction.

Id. 181.

The Court, after an extended statement of the facts, said:

"The only question here raised is whether the contract conferred on the Westerly Waterworks the exclusive right to use the highways for laying and maintaining water pipes."

Id. 187.

And the Court first reaches the conclusion that there was no authority for the grant of an exclusive right.

Id. 187–188.

And they said:

"The final question thus recurs whether the vote of the town of April 11, 1895, and the subsequent votes and proceedings, do impair the obligation of the contract made June 29, 1885. There can be no doubt that the effect of carrying out this vote will be greatly to depreciate the value of the waterworks and of the bonds issued by them, and that the town intends to proceed to construct its works, and to supply water to the inhabitants, regardless of these consequences. The Westerly Waterworks will remain under the obligations of the contract to supply water without charge for the town hall and for drinking fountains, to maintain a prescribed head of water, and, perhaps, to sell, their works to the town at an appraised value. It seems reasonably clear that, if there be a contract here, the value of the contract, at least, will be materially impaired. The respondents urge that to grant the relief here prayed for, and to enjoin the construction of the water works, would be in effect to give the complainants the benefit of an exclusive franchise, to

which benefit they are not entitled This statement, however, is not entirely correct.

If the complainants had an exclusive right, they could enjoin *any other waterworks*, even if they were unable to supply the persons to be accommodated by the proposed works, and even if there were no immediate ascertainable injury to themselves. This is the result, as it seems to me from all the cases on this question, provided, always, that the conduct of the owners of the franchise is not such as to forfeit their rights. On the other hand, to refuse relief here would be to permit the destruction of the whole contract. There must be some rights which are entitled to protection under the contract admitted, and found to be valid."

75 Fed. 188–189.

After considering this question and especially some of the authorities upon it, the court further said:

"Turning, then, to the substantive question which, as it seems to me, must be here decided, the question is whether the contract here in dispute contains an implicit reservation, founded on the then-existing state of the law, of a right of a town, at pleasure, to construct waterworks. The law gives power to construct waterworks, and also to contract for a water supply, and, as incidental to such contract, to confer certain rights and exemptions on the contractors. Does this leave it competent for the town to make a contract with this corporation, and afterwards without any default on the part of the corporation, and in derogation of the terms of the con-

tract, to construct other works? *The question is not whether the town may grant a franchise to be exclusively exercised by the company for a term of years, without regard to its ability or willingness to furnish an adequate supply of suitable water; but the question is, rather, whether the town has not, by its own act under one branch of the law, limited its power to act under the other branch of the act.* Answering this question in the affirmative, I find that the town is making the attempt to exceed the limits to set; and the finding of the Supreme Court of Rhode Island is ground for a conclusive finding here that such attempt is in terms authorized by the State law—that is to say, that the acts which I find to have this character are so authorized. The necessary conclusion on this point seems to me to be that this proceeding amounts to an act of the State impairing the obligation of a contract."

Citing Hamilton Gas-light & Coke Co. v. Hamilton City, 146 U. S. 258.

Now here it is explicitly determined that the City may be bound by a contract without necessarily granting an exclusive franchise. And the Court in this case issued a preliminary injunction. From this order an appeal was taken to the Circuit Court of Appeals and dismissed on the ground that that Court had no jurisdiction. See

Town of Westerly *et al.* v. Westerly Waterworks, 76 Fed. 467.

In dismissing the appeal the Court suggested that if the parties desired a rehearing on the

merits, they should move in the Circuit Court to dissolve the injunction.

Id. 468.

In pursuance of that suggestion, they did move. See

Westerly Waterworks v. Town of Westerly, *et al.*, etc., 77 Fed. 783.

When this motion was brought up at this place, it was objected that the decision of the Court in granting the preliminary injunctions put the matter at rest in that Court. This objection, however, was overruled and the case was set down for hearing before two judges. It was heard. See

Westerly Waterworks Co. v. Town of Westerly, 80 Fed. 611.

And when the cases came up on the motion to dissolve the temporary injunction, the Court said that as the merits had been exhaustively argued and all parties had requested a decision upon the main questions which determined their substantive rights, they proceeded to consider it. Now, in that case or at that time, the court came to the conclusion that the injunctions should be dissolved, and they were dissolved. They reached this conclusion upon a consideration of the laws of the State of Rhode Island and the peculiar political constitution of these towns, which were held to be a something different and distinct from the town council. The points, however, which we had in mind were the following: "All persons contracting with a municipal corporation must at their peril inquire into the power

of the corporation or of its officers to make the contract. * * * This rule is for the public protection, and there can be no case wherein it should be more strictly applied than one involving the granting of an exclusive franchise. * * * As it is assumed in the opinion of the learned district judge granting the temporary injunctions, that a valid contract exists, even if an exclusive right has not been granted; as this is assumed by counsel for the waterworks and for the Seamen's Friend Society; and as the origin and exact nature of that contract are somewhat obscure, after the concession that exclusive rights were not conferred upon the company, it becomes necessary to dwell upon this point. Our primary inquiry is rather as to what rights the company has than as to whether they arise from a 'contract', using the term in the sense of an agreement between competent parties, or from the so called 'contract' arising between the legislature and the company from the direct or indirect franchise."

They then proceed to inquire into the rights which accrued to the company and the obligations imposed upon the town, and, as we said before, came to the conclusion that the town had not disabled itself in that case to construct other works.

The page from which we have been quoting last is page 614.

On page 618 the Court say:

"But this argument leads to such a conclusion that we must reject it. The Company is bound, if bound at all, to supply water, not for 25 years, but to supply it 'at all times,' and this

would lead us to a perpetual contract, and a perpetual contract would not be within the class of contracts which upon any theory the town is authorized to make. It is only by retaining the word "exclusive" that we can find an intention of the town to preclude itself from competition; that is to say, upon the theory of the argument of the complainants, the town had no power to grant exclusive rights, and so far as unlawful such language must be rejected, but so far as lawful it may be retained. The contract for exclusive rights necessarily covers the exclusion of the town. The town had a right to contract, not to compete for a reasonable time, and an intention so to contract is a necessary implication, from the use of the word "exclusive." In other words, we must reject the word "exclusive" as a word of grant, and retain it as a word of contract, but limiting its application to the town, though it was used as applicable to the town and to all others. Then from the fact that the town, according to this construction, has agreed not to compete, we infer an agreement imposing upon it the obligation to buy the Company's works if it does compete."

The Court then say that they doubt that the claims of the complainants could be supported by a reasonable construction of the language, and then say:

"Without, however, deciding the proper construction to be placed on the contract when the exact limits of the legal powers of the town under chapter 285 are determined, and without finally deciding the question of power in the town to agree to preclude itself from competition, we will for our present purposes assume the existence of such power as a necessary basis for an examination of the question. Has the power in fact been exercised by the town itself?

Has the town adopted or ratified the action of the council by corporate action in town meeting or otherwise, or by acquiescence?"

Id. 618.

And then, as before stated, it is determined that the power had not in fact been exercised by the town, and that the town had not adopted or ratified the action of the council.

But no such conclusions can be reached here. If there were any limitations upon the power of the council to make this contract, they came from the legislative action, and the same power which placed those limitations there removed them when it ratified this contract. And there is no question here of the fact of its ratification. The act of ratification is of as high nature and emanates from the same authority as the limitations upon the power to create exclusive grants referred to by the counsel.

In

Walla Walla City v. Walla Walla Water Company, 172 U. S. 1,

a question of a very similar nature arose. In that case there was in the contract an expressed agreement on the part of the City not to construct works, and this Court said that that express agreement was little more than an agreement on the part of the City that it would perform the obligations of the contract on its part in good faith. It was alleged in the bill in that case that the proposed action of the City was in fraud of the plaintiff's rights under its contract with the City, and the protection guaranteed to it under the Constitution of the United States.

172 U. S. 7.

And it was there claimed on behalf of the City that its action in entering into this contract was not the exercise of its sovereignty, and that in that particular it was not acting as the agent of the State, but was merely exercising a power as agent of its citizens and representing solely their proprietary interest, and therefore that its ordinances in this respect were not laws of the State, and that neither the State, nor the City as its agent, could be charged either with the making or the impairing of an original contract.

Id. 7–8.

And in this case the Court held that the contract in question was limited to 25 years, and was not an attempt to grant an exclusive privilege.

Id. 14.

And that in their opinion an ordinance granting a right to a Water Company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a City with water, does not create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with the further stipulation that the City shall not erect waterworks of its own.

Id. 14–15.

Again: "Nor do we think the contract objectionable in its stipulation that the City would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that

the City would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the City should desire to establish waterworks of its own, it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the City would carry out the contract in good faith."

172 U. S. 17–18

VIII.

The next proposition of counsel is that the City did not possess the power to bind the state not to to reduce water rates. [Brief, p. 31.]

Santa Ana Water Company v. the Town of San Buena Ventura, 56 Fed. 339, we have already cited. There the power under which the town acted was a power to secure the health, cleanliness and good order of the town; to provide for the extinguishment of fires, and to supply the town with fresh water. Under this the contract was made which conferred upon Arnaz and others the exclusive privilege of supplying the town for fifty years.

Id. 340–341.

And gave them the unrestrained right to es-

tablish such rates for the supply of water to private persons as they might deem expedient, provided that such rates be general.

Id. 341.

This contract was upheld by Judge Ross, the legislature having subsequently ratified it.

Id. 342.

But certainly to confer the power upon particular individuals or their assigns, to fix the rates themselves, if valid, when ratified by the state, does bind the City not to reduce water rates. And so we say here, whether the City had the power in the first instance or not, its act was ratified by the legislature. It was a power which the legislature could confer, and hence could ratify the act after it was done.

We are told that the lessees, which is the name that our adversaries most delight to give us, did not believe that the City had authority to execute the contract is pretty clearly shown by the fact that in 1870 they, or the Los Angeles City Water Company, obtained a special statute purporting to confirm the action of the City. To which we answer that there is nothing to show that either the City Water Company, or any of its assignors, obtained the passage of the ratifying act at all; and secondly, if they had done so, it is nothing at all uncommon to have many things done to remove any possible doubt that others may have, when one has no doubt himself.

On page 46 of the brief under this same point, counsel take occasion to say that the value of this property has been fixed at one million

one hundred eighty-three thousand dollars by arbitrators appointed under the contract.

Now, while we do not know what effect this can have upon the question of whether a judgment given long before that time was or was not correct, and there is nothing of this kind in the record, we respectfully beg leave to say that no such determination has been made. On the contrary, the Los Angeles City Water Company denies that there has been such a determination, and litigation is now pending between the parties upon that very question. But the conclusions which are drawn from the argument of the counsel are not warranted by the cases which have been decided. Even where it is held that cities have no power to grant exclusive franchises or monopolies to endure forever, they may contract for the construction of works, and in order to induce capital to enter upon such an enterprise, may give them a right for a limited time, reserving to themselves the power to purchase the plant at the end of that time, or some lesser time, according to the terms of the contract

And now that the thirty years has expired, as soon as the amount to be paid has been determined, the City may, if it chooses, purchase the works and put an end to the rights of the Los Angeles City Water Company. And the City cannot receive all the benefits of this contract for nearly the entire period of the thirty years and then claim that the contract is invalid in the particular now under discussion.

We say again that it is not very obvious that

any doctrine of the power to grant exclusive rights, or what is a sufficient exercise of that power when it exists, has anything at all to do with this case. We are at a loss to perceive what a provision in this contract declaring that the Mayor and Council reserve the power to fix the rates, but agree that they shall not be lower than the then existing rates, has to do with a grant of any kind. It certainly does not in terms purport to be a grant, but it is a reservation of a power with the limitation referred to, and hence whatever doubts or difficulties there may be in the distinction referred to in the cases which we have been considering between the word "exclusive" as a word of grant and the same word as a word of contract, there is none whatever with reference to this particular subject. It is wholly a matter of contract and the interpretation of the agreement between the parties, and the rule for construing public grants has nothing to do with it. The contract must be supposed to have been entered into by both parties in good faith, and without any mental reservations on the part of either party of an interpretation that was to entirely emasculate it of all meaning and of all honesty.

In the Santa Ana case, 56 Fed. 339, as we have already shown, there was the right given or granted to the contracting parties to fix the water rates, and of course it was properly construed, not to mean the power of extortion, nor of establishing unconscionably oppressive rates. But here the parties have agreed upon what was reasonable, and it never occurred to anybody to

imagine that they were not reasonable until within the last few years. One of the cases cited by counsel, that of Des Moines v. Des Moines W. W. Co., 95 Iowa. 348, is said to declare that the presumption is that rates established by council are reasonable. With much greater reason may it be urged that where the parties were deliberately entering into a solemn compact and have agreed that in the exercise of the power of regulation, they shall not be reduced below a certain point, that that point which has thus been fixed by the contract is not unreasonable. It is needless to go into an examination of the various authorities cited by our adversaries. There is not anything in any of them but that may be admitted without in any way affecting the questions here. The power of the City to contract may not extend to such contracts as are against public policy, as is said on page 82 of the brief. But where do we go to ascertain what public policy is? Certainly the legislature is exactly the authority to declare that public policy, and when a contract has been made by a municipality, ratified by the legislature, acted upon by the parties for thirty years, declared by all the tribunals before which it has come, both State and Federal, to be valid, it requires no little courage to assail it upon the ground that it is in contravention of public policy. Counsel conclude the point which we are here considering, on page 90, by declaring that the result will not affect the Company as it has gone on for the whole of the thirty years term and collected only

the rates which were fixed by the council, but neglects to add that for the first fourteen or fifteen years of that time, it fixed the rates which had been established, and agreed upon, as those which were collected in 1868; and that since that time it has been invading the rights of the Los Angeles City Water Company under the contract, against its protest, and growing worse every year until it became intolerable.

NINTH: The third point made in the brief is that the provision of the contract of 1868, restraining the City from granting any other franchise, invalidated the whole contract. We do not desire to make any further reply to this than has been made in the opening brief, and will simply repeat here what has already been said two or three times, that the Supreme Court of California, as well as the United States Circuit Court, has had this contract before it many different times and never in any instance has its validity been doubted by the courts.

TENTH: The next attack is upon the Act of 1870, purporting to ratify the contract of 1868, and which is said to be unconstitutional and void. [Brief, page 95.] This also has been fully answered in advance.

ELEVENTH: The fifth point is that the Company has no right to collect any rates except such as are prescribed by the constitution and statutes of the State. [Brief, page 102.] Where either the constitution or statute prescribes any rates, we are not told. Both do provide for the establishment of those rates by the City Council, and the point here made, and the earnestness

with which it is insisted upon, fully justify the assertion in the bill in this case, that if the Company attempts to collect any rate except that fixed by the Council it will certainly be met with an attempt to deprive it of its property. We say here that the case of the People v. Stanford, decided by the Supreme Court of this State, cited in the opening brief of the appellee, was an interpretation of the constitution of this state upon the subject of forming corporations, and it was held that those provisions of the constitution and the case of the Spring Valley Waterworks did not prevent the conferring of such powers upon private individuals, nor affect them when transferred to corporations. But, as already shown, that particular provision of the act of 1852 relied upon to affect this contract had no reference to powers conferred upon private corporations, but was a limitation upon the power of the municipal corporation, a corporation which not only could be created by special act, but in this very instance was.

TWELFTH: The point that this Company has waived its right to or is estopped from claiming equitable relief, as contained in the fourth point, page 111 of the brief, was sufficiently answered in advance. There never was a single instance from the time the City began these dealings with the Company in which it did not protest against it. Besides as these ordinances fixing rates, are passed every year, take effect in July, and by the very terms of the constitution, can only exist for a year, it is not very plain what is meant here by laches on the

part of the Company. With all the diligence that we can put to the pursuit of a remedy for these wrongs, we are unable to get around within the year. In fact the time for an appeal from the judgment is two years, and the difficulties of pursuing remedies, and making judgments effective when they are recovered, are such that parties may well be pardoned for refraining from suit when they know that the tribunal which has done them a wrong has the power, and that it is its duty, to correct it, in a year. Besides it is a curious argument that a municipal corporation by repeated flagrant violations of its solemn compacts, has acquired the right to persist in those wrongs notwithstanding that the contract itself continues in full force.

The reason which counsel have discovered for the Company's acquiescence, viz: that it was obtaining its whole water supply up to 1887 from the river, amounting to several hundred inches above the ten inches which the contract permitted the lessees to take, and the fear that the City would prevent that use, is one in which counsel could hardly have, themselves, found a great deal of satisfaction. It has been determined by the United States Circuit Court, and that determination approved by the Supreme Court of the State of California in Los Angeles v. Los Angeles City Water Company, 124 Cal. 368, 377, 379, that the ten inches of water does not mean any such thing as is contended for by the City. As to the assertion that the water claimed by the Crystal Springs Land and Water

Company are of the same character as the waters which were held to belong to the City, in the case of the City of Los Angeles v. Pomeroy, *et al*, 124 Cal. We answer that no such thing appears in the record here, nor does it appear to have been held in the case of the City of Los Angels v. Pomeroy, *et al*, that the City did own the waters. All that has ever been held by the California Court is that the City had the paramount right to the use of it, but it neither has the paramount right, nor any right, to the use of it for supplying the inhabitants of the city for domestic uses, while this contract is in existence; and the contract is in existence until the value of the works is paid by the City. See contract in the stipulation of facts. [Tr. fols. 185, 186. Particularly the concluding portion of the last folio.]

THIRTEENTH. The next attack is upon the finding that the water rates fixed by the ordinance in question were not shown to be lower than those presrcibed by the contract. This we have doubtless sufficiently answered, but we again call attention to the fact that in entering into this contract, the parties used many words and sentences susceptible of more than one interpretation Now with reference to this supplying the inhabitants of the City with water for domestic purposes [Tr. fol. 183] it is not always easy to determine what would and what would not come within the meaning of that term. The things contained in the schedule of rates, which counsel select apparently for the purpose of showing us that they are not domestic uses, are

for the most part unquestionably included strictly within that term. The use of the water in bakeries and boarding schools, bath tubs in barber shops, water for horses and for washing carriages, horse troughs, come fairly within the meaning of the term. Why is not water for a bath tub in a barber shop or the use of water in cooking in bakeries and the supplying of people with water to drink at boarding schools just as much domestic uses as if the bath tubs and the cooking stoves were used in private houses, and the teachers and pupils at the boarding schools were at home. Water for horses and washing carriages is all included strictly within the term "domestic purposes." Some of the matters enumerated on page 118 may very well be said not to come within the strict definition of that term. But now let us consider the entire contract upon this subject. The Company was to secure to the inhabitants of the City a constant supply of water for domestic purposes. They were to furnish the public schools with water free of charge and the city hospitals and jails, etc. [Tr. fols. 183, 186.] They were to have the right to sell and distribute water for domestic purposes and to receive the rents and profits thereof for their own use. They had the right to lay pipes in any and all of the streets. The waterworks then existing were delivered over to them, but as already stated, to be effectually removed and a new system constructed, of which they were to have the possession at least for the period of thirty years, and until they were paid therefor. Now, says

the contract, "provided always that the rights and privileges by these presents conceded to said parties of the second part do not embrace to any extent or have any reference to the water-works of said City, used for the distribution of water for the purposes of irrigation, or affect in any manner any rights of irrigation, either existing at the present or which may exist hereafter, except as to the ten inches of water as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part shall not dispose of any water for the purpose of irrigation, but shall only take from said river the water necessary for domestic purposes, as above specified."

Id. Fol. 187–188.

Now we are to remember that this contract was one entered into with the expectation that the City would expand and increase in population, and as a matter of fact, it has become a great City. The Court knows that in the very nature of the subject of this contract, viz: the furnishing a City and its inhabitants with water, it is impossible that there could be an irrigating ditch running by every door in the City of Los Angeles; yet the only works that the City reserved and the only rights of distribution of the water which it retained to itself were those which related to the purposes of irrigation. Was it not contemplated that the people would keep horses and cows, and other domestic animals? That they would have bath tubs, barber shops, hotels, machinery of various kinds running in the City, and that water would be needed for a

thousand uses not included within the term "irrigation," and far more closely allied to the use of water for domestic purposes, and uses which the City from mere irrigation ditches could not supply? And in view of the fact that no other provision is made in these contracts except for the two, viz: the City, and Griffin, Beaudry and Lazard, and their assigns, can it be doubted that when they were speaking of domestic purposes, they had in their minds all the uses which a civilized people, and under a municipal government would require, other than irrigation? If, therefore, we take the language employed, the terms inserted, and read them with reference to the subject matter of the contract, scarce any other interpretation could be placed upon the contract than that this term "domestic purposes" was intended to include everything except that which was *ex industria* retained out of it. But when to this is added the fact that from the beginning of the contract until this time, the Company and its predecessors have been supplying all of these uses, and that it never entered into the mind of anybody to question the propriety of this interpretation which the parties had put upon this contract, until this controversy began, it is submitted that this interpretation thus fixed by the conduct of these parties, has placed the meaning of the contract beyond controversy.

FOURTEENTH: The next proposition contended for is, that if the contract of 1868 is valid and the ordinance of 1897 reduces the income below that which it should receive, the ordinance is void on its face, as being in conflict with the

federal constitution, and is no cloud on the complainant's title. [Par. VII. of the brief, page 122] It would be difficult to conceive of a more forcible answer to all of these various "ifs" than the counsel themselves have furnished. We had just been treated to a dissertation intended to persuade us that the Company was collecting rates for a great many purposes for which water was not being employed when the contract was made, and which did not come within it. Does that fact appear upon the face of this ordinance? Does it appear upon the face of the ordinance that it reduces the income of the Company below that which it should receive? Why the whole argument of counsel for the appellant is that no such thing either appears upon the face of it nor anywhere else, and a forfeiture could accrue. And there it was not decided in the case brought by the City of Los Angeles against the Los Angeles City Water Company and reported in 124 Cal. 385, or anywhere else, that the City was the real owner of the distributing plant, subject to a lien or right of possession for the protection of the lien on the part of the Company. In that case the whole controversy arose out of the threat of the City to take possession of the property. A receiver had been appointed to take the rates. The appeal was taken from the order appointing the receiver, and the injunction, so far as the court below had granted one against the Los Angeles City Water Company. In the opinion, the rights of the parties were very clearly set forth; and as at first delivered, the case of the National Water-

works v. Kansas City, 62 Fed. 853, decided by Judge Brewer, was declared to approach more nearly to the case at bar than any to which their attention had been called. They quoted from the opinion of Judge Brewer, and heartily approved of it and said: "Our conclusion, therefore, is both upon principle and authority, that the City, at the expiration of the thirty years, had no right to the possession of the waterworks without payment or tender of payment of their value." 124 Cal. 382, 383.

In the opinion upon a petition for a re-hearing, they took occasion to say that the Water Company is substantially in the position of a mortgagee in possession, having a lien on the property involved, as security for the performance of the covenants of the City contained in the contract, and this is supposed to have overthrown everything that was declared in the original opinion. It not only does nothing of the kind, but interpreted by the rules which have been so often laid down for the construction of the language of the court, viz: "that what is said in the opinion is to be construed with reference to the points involved in the controversy," it is exactly in accordance with what had been before said. The mortgagee in possession is entitled to remain in possession and to collect the rents and profits until his debt is paid. The same thing is true of a vendor in possession, and other contractual relations may give rise to the same rights.

Scarce anything could be imagined more ab-

surd than to say that this contract is in fact a mortgage. All the property that the City is even claimed to have, was by the contract to be obliterated There was the construction, at its own expense, by the Los Angeles City Water Company, of an enormous system of waterworks, the construction of which has been going on for thirty years, on property which in large part belonged to itself in fee simple, and as to the remainder, did not belong to the City; constructed out of materials that had not even been mined out of the earth when the contract was made. If any such interpretation is to be placed upon such language as was used by the Supreme Court, above quoted, we reply to it simply that the construction is manifestly erroneous, and this court is not to be bound by any such interpretation if it cuts any figure in the case.

But in that opinion the Court did say, quoting the language of Judge Brewer: "That the Company was entitled to retain the possession of the property till it was paid for." If that be so, is it not equally its duty to perform the terms of that contract?

If the growth of the City requires still further extensions of the water system; in order to meet it, must not the Company extend its system? If new and enlarged pipes become necessary to supply sections of the City which the increased population may demand, is it not the duty of the Company to provide it? Retaining the system of works, is it not still bound to furnish the City with water for the various municipal purposes, free of charge? But if we are correct in

supposing that all of these duties still rest upon the Company, then it is submitted that the City cannot escape the obligations which rest upon it. The claim that the case in 124 Cal. 368 sustains the position which the Company's attorneys took in the case of the City of Los Angeles v. the Los Angeles City Water Company, 49 Cal. 638, is another of the despairing efforts of the City seeking to excuse its plain violation of the contract. The claim made by the Company's attorneys in that case was denied by the Supreme Court of California. The Company was there claiming that the property was not taxable in its hands. That Court said that it was, and that too, notwithstanding they decided that a debt, though secured by a mortgage, was not property within the meaning of the constitution, requiring all property to be taxed.

People of the State of California v. the Hibernia Savings and Loan Society, 51 Cal. 243.

FIFTEENTH: The eighth point, viz: that the Company was engaged in violating the contract of '68 by taking more water than it was entitled to, and was therefore not authorized to demand specific performance, is answered by the decisions of the Supreme Court of California that have already been referred to, as well as by the decision of Judge Wellborn in this case, and the sections of the code referred to concerning the appropriation of water could not have had any effect upon the minds of the parties in entering into this contract, since the code itself was not adopted for

four years after the contract had been entered into.

Counsel for the appellants have annexed to their brief as a sort of an appendix the opinion of Judge McKinley of the Superior Court—a *nisi prius* tribunal—delivered several years ago, in a suit brought to restrain other companies from constructing works in the City limits, and we are told in the brief that after these parties had been harrassed by litigation by the City Water Company, they finally abandoned and left the field.

It will be seen that in that case, the learned judge of the Superior Court was of the opinion that the exclusive part of the franchise, if it were such, was beyond the power of the City, but that decision was upon a demurrer to the complaint, and it is true that the litigation afterwards ceased and the parties never constructed the works.

But this contract, as we have several times stated, has been before different courts since that time, and its validity has never been denied by anyone. And in the recent case before the Supreme Court of the State of California, it is manifest that that Court considered the contract perfectly valid. It is true that that case no more than this, called for a determination as to whether the exclusive part of the contract was or was not valid, but it certainly was not considered as rendering the whole contract void.

In this case in which Judge McKinley's opinion was delivered the City of Los Angeles was not a party, and of course the judgment cannot op-

erate as *res judicata* in this case, nor indeed in any other, even upon the point decided by the learned Judge; but we say again, it is of no effect here. The question here is as to the power of the City of Los Angeles, acting under constitutional and statutory provisions, to establish rates in violation of the contract, and it is respectfully submitted that the decision of the Circuit Court in this case is correct, and that the judgment should be affirmed.

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